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In The Supreme Court of the United States

October Term 1958

No. 821

JOSEPH ARNOLD REVARD,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

JOSEPH ARNOLD REVARD,
Petitioner,
Oklahoma State Penitentiary,
McAlester, Oklahoma.

O. B. MARTIN,
208 Leonhardt Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

APRIL, 1959.

KING LAW BRIEF CO., COMMERCE EXCHANGE BLDG., OKLAHOMA CITY—PHONE FO 5-2969

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PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Criminal Court of Appeals for the State of Oklahoma entered in the above entitled cause on November 19th, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum order overruling the petition for rehearing filed before the Criminal Court of Appeals of

the State of Oklahoma was entered on December 10th, 1958 (R. 572), and is unreported and appears in Appendix A attached hereto, *infra* page 61 (R. 572). The opinion of the Criminal Court of Appeals of the State of Oklahoma which is the court of last resort pertaining to criminal appeals in the State of Oklahoma entered in this cause on November 19th, 1958, is reported in 332 P. 2d 967, and appears in Appendix A attached hereto, *infra* page 37 (R. 550).

The judgment of the Criminal Court of Appeals of Oklahoma was entered on November 19th, 1958 (R. 550) Appendix A, *infra* page 48. A petition for rehearing filed by the plaintiff was denied on December 10th, 1958 (R. 572) Appendix A, *infra* page 61. Jurisdiction in this Court is invoked under Title 28, U. S. C. A., Sec. 1257 (1) (2) (3). Petitioner states that the state courts, both the trial and appellate courts, made erroneous application of the applicable state statutes pertaining to murder and manslaughter, and pertaining to the defense of insanity, and while the accused was suffering delirium tremens, which statutes are set forth in Appendix B attached hereto, *infra* pages 62-65, and in erroneously instructing the trial jury with reference thereto as applied to the evidence in this case and in receiving perjured evidence introduced on behalf of the State in the trial of the cause, all of which resulted in the denial to the petitioner herein of his constitutional guarantee of due process of law accorded him under the provisions of Article 5 and

Sec. 1 of the 14th Amendment of the Constitution of the United States.

QUESTIONS FOR REVIEW

Petitioner was convicted and sentenced to life imprisonment on the charge of murder, the victim being his wife. His defense was not guilty by reason of insanity, and the questions presented in this appeal are whether or not the petitioner was denied fundamental fairness and justice under due process of law in the following particulars:

(1) Whether or not the State court gave the proper instruction to the jury pertaining to the petitioner's defense of insanity under the test used in Oklahoma, being the right and wrong rule or the McNaghten rule.

(2) Whether the State court should have included in its instruction to the jury with reference to the plea of insanity on behalf of the petitioner, a charge embodying the irresistible impulse rule.

(3) Whether or not the State court erroneously permitted perjured testimony to be introduced by the State in its case against the petitioner.

(4) Whether or not the punishment of life imprisonment received by the petitioner for murder was unreasonable and disproportionate to the crime proven against him, and whether or not the punishment should have been for first degree manslaughter which carries a penalty of not less than four years confinement.

STATUTES INVOLVED

The statutory provisions involved are those relating to the offenses of homicide defined as murder and manslaughter by the statutes of Oklahoma, being as follows:

Title 21 O. S. A., Secs. 692, 701, 702, 704, 711, 715, 731 and 733.

Also the statutes of Oklahoma pertaining to a defense of insanity contained in Title 21 O. S. A., Sec. 152 (4) and Title 22 O. S. A., Secs. 1161 and 1162. All of these statutes are printed in Appendix B, *infra* pp. 62-65.

STATEMENT OF THE CASE

On August 1, 1957, the petitioner was charged in the District Court of Oklahoma County, Oklahoma with the offense of murder by beating and stomping the victim, his wife, to death. His defense was not guilty by reason of insanity. A jury trial was held on November 18th, 19th and 20th, 1957 in which the evidence disclosed that the petitioner and the victim, his wife, had been drunk from Saturday preceding up to Wednesday, May 8th, the date on which the crime was committed (R. 241), and that on May 8th they both drank four pints of whiskey (R. 243). The defendant testified that he did not know anything about kicking or beating or striking her (R. 255). The documentary evidence introduced showed that the petitioner had been adjudged a mental patient and had been committed to the mental hospital at Ft. Supply, Okla-

homa on October 12th, 1954, from which he was discharged on December 7th, 1954, and on July 25th, 1956, he filed a petition to be restored to mental capacity in the County Court of Kay County, Oklahoma, which had committed him to the mental institution but a hearing was never held on this petition, so that on the date of the alleged murder, he was still a mentally incompetent person according to the records (R. 532). One psychiatrist testified on behalf of the State and two on behalf of the petitioner during the trial of the cause, and their conclusions were contradictory to each other as to the mental condition of the defendant on the date of the alleged offense. The court gave its charges to the jury pertaining to the law of the case, including the defense of insanity, and the jury returned its verdict of guilty. On November 29th, 1957, the defendant filed a motion in arrest of judgment. On December 6th, 1957, the District Court committed the defendant to a State mental hospital for observation for a period of time not exceeding ninety days to determine the condition of his sanity. Thereafter, the defendant filed his motion for a new trial. On February 17th, 1958, the defendant was tried before a jury in the District Court of Oklahoma County on the question of his sanity, and the jury returned a verdict that he was sane. On February 27th, 1958, the defendant presented his motion for a new trial at which there was introduced a transcript of the testimony of State's witness, Hope Pena, taken at the pre-

liminary hearing which showed the difference between her testimony given at that hearing and at the jury trial of this case. The court overruled the defendant's motion, and sentenced him to serve a term of life imprisonment in the State penitentiary at McAlester, Oklahoma.

On February 27th, 1958, the defendant gave notice of appeal to the Criminal Court of Appeals of Oklahoma, and on August 13th, 1958, his appeal was lodged in said court. On November 19th, 1958, the Criminal Court of Appeals of Oklahoma consisting of three judges, being the final court of resort in Oklahoma pertaining to criminal matters, rendered its opinion sustaining the trial court's conviction of said defendant. On December 10th, 1958, the Criminal Court of Appeals denied defendant's petition for a rehearing. Thereafter, on February 5th, 1959, the defendant filed notice with the Clerk of the Criminal Court of Appeals of Oklahoma announcing his intention to file a petition for writ of certiorari with the United States Supreme Court asking said Court to review said decision and opinion. In the meantime, the petitioner was delivered to the warden of the State penitentiary at McAlester, Oklahoma where he is now confined.

REASONS RELIED UPON FOR THE WRIT

(1) The State court erred in giving its Instruction No. 11 wherein it attempted to define the rule in Oklahoma pertaining to the defense of insanity, being the right and wrong test or the McNaghten rule, but in the giving thereof, the court erroneously conjoined the different segments or facets of the rule with the word "and" instead of disjoining them by using the word "or," and thus misapplied and misconstrued the statutes and the law embodying the defense of insanity.

(2) The Oklahoma court erred in failing to give a complete and proper instruction pertaining to the defense of insanity by failing and refusing to include therein the irresistible impulse rule in addition to the right and wrong test.

(3) The Oklahoma court erred in admitting or receiving into evidence perjured testimony on behalf of state's witness in establishing its case against the petitioner.

(4) The punishment of life imprisonment received by the petitioner for the crime committed is excessive, unreasonable and disproportionate to the crime proven, that of first degree manslaughter under the evidence in this case which carries a penalty of not less than four years confinement.

ARGUMENT

1. Due process has been denied in that the trial court erroneously gave Instruction No. 11, later affirmed by the Criminal Court of Appeals of Oklahoma.

In this case, the petitioner was charged with the crime of murder, and his wife was the victim. Her death resulted from blows or beating allegedly from the hands and feet of the petitioner which followed several days of drink

ing in which both of them participated. The petitioner was in a state of delirium tremens when the incident occurred, and he interposed a defense of insanity, contending that he had blacked out at the time of the murder, and had no knowledge of what he was doing or the consequences thereof.

The trial court, among others, gave Instruction No. 11 (R. 480) as follows:

> "You are instructed that an insane person is not responsible criminally for his acts committed when such mental condition existed. The test of criminal responsibility for acts which would ordinarily be criminal under the law is: the mental ability or capacity to distinguish between right and wrong as applied to the particular act, and to understand the nature and probable consequences of such act, that is to say, the capacity to know right from wrong and to know then that the particular act alleged to have been committed was wrong."

We assert that this is not the proper instruction as relates to the defense of insanity.

The right and wrong test as set out in this instruction originates from the English system of criminal jurisprudence and was originally condemned in the McNaghten case in the House of Lords in 1843 (10 Clark & Fin. 200). This rule resulted from a debate in the House of Lords as to the nature and extent of the unsoundness of mind which would excuse the commission of a felony. The House of Lords submitted the questions to the judges from which Lord Chief Justice Tindall wrote the famous McNaghten opinion. The questions submitted were:

"What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?

"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

The judges answered these questions in the following language:

"And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven to their satisfaction; and that to establish a defense on the grounds of insanity it must be clearly proven that at the time of committing of the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

It is to be noted that the two propositions are separated in the McNaghten rule with the correlative "or," while the trial court in the case at bar used the conjunctive "and." The Oklahoma Statute dealing with the defense of insanity is found in Title 22, O. S. A. 1161, and it provides as follows:

"An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment or punished

for a public offense while he or she as the case may be is insane."

The Oklahoma State Legislature has failed by statute to define the term "insanity," and has spelled out no rules or tests governing the defense of insanity to a criminal charge. The Oklahoma courts have announced the law to be the rule in the McNaghten case. However, the trial court in the case at bar did not correctly follow the McNaghten rule because in giving Instruction No. 11 it used the conjunctive "and" instead of the correlative "or."

The giving of such an instruction with the conjunctive "and" was condemned in the case of *People* v. *Sherwood*, Court of Appeals 1936, 271 N. Y. 427, 3 N. E. 2d 581, wherein the New York state court construed Section 1120 of its penal code which reads as follows:

"Provided an act done by a person who is an idiot, imbecile, lunatic or insane is not a crime, a person cannot be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding for making his defense.

"A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that at the time of committing the alleged criminal act he was laboring under such defect of reason as:

"1. Not to know the nature and quality of the act he was doing; or

"2. Not to know that the act was wrong.

It is to be observed that this legislative enactment is most similar to the rule in the *McNaghten* case, and the correlative "or" is used in that statute. The trial court in the *Sherwood* case gave its instruction to the jury on the right and wrong test by connecting the two parts or facets of the rule with the conjunctive "and" instead of "or" as was used in the New York statute and in the *McNaghten* opinion.

The Appellate Court in reversing the conviction in this case stated:

> "It was of the utmost importance, therefore, that the law as respects criminal responsibility under Section 1120 of the Penal Law, should have been made clear to the jury.
>
> "In the main charge it was not made clear that a defect of reason which inhibited a knowledge *either* of the nature and quality of the act *or* that the act was wrong, excused a person from criminal liability. At various points the two matters were referred to in the conjunctive with the word 'and' instead of the word 'or.' The error was called to the attention of the court at the close of the main charge, and the court said merely: 'If I made that error, I so charge.' Left in that way, the distinction might doubtfully be considered as having been made clear. But thereafter —and it was the court's last word before the jury retired—the court upon request charged that a mere false belief would not be sufficient to excuse her, 'unless it was the result of some mental *disease* which prevented her from knowing the nature and quality of the act *and* that it was wrongful.' Here was a repetition of the same error, complicated with a reference to 'some mental disease,' i. e., some pathological condition, instead of a 'defect of reason' as the statute reads. No disease, no pathological condition, existed

> or was claimed to exist. It may be doubted whether the jury had a clear conception of when a person is or is not criminally liable under Section 1120. * * *
>
> "The judgment of conviction should be reversed and a new trial ordered."

It would follow, therefore, that the trial court in the instant case committed error when it used the word "and" instead of the word "or" in dealing with the two parts or facets of the rule promulgated in the *McNaghten* case, and the petitioner Revard was denied a fair trial by reason of this error. Under Instruction No. 11, as given, the jury, in order to have acquitted the petitioner on his plea of insanity would have to have found that he did not have the mental ability or capacity to distinguish between right and wrong as applied to the facts in this case, and that he did not understand the nature and possible consequences of his acts. This instruction placed an added burden on the jury not contemplated by the McNaghten rule which has heretofore been considered as the proper rule in Oklahoma.

The subject of giving improper charges to a jury or failure by the court to give proper charges is a proper one to be considered in determining whether or not a litigant has been denied due process of law. See *United Gas Public Service Company* v. *State of Texas*, 58 Sup. Ct. 483, 303 U. S. 123, 625, 82 L. Ed. 702, affirming *United Gas Public Service Company* v. *State*, 89 S. W. 2d 1094, and *Western*

and A. R. R. v. *Gray*, 172 Ga. 286, 157 S. E. 482, appeal dismissed 1931, 51 Sup. Ct. 654, 283 U. S. 811, 75 L. Ed. 1428.

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2. Due process has been denied to the petitioner by the failure of the trial court to give proper instructions relating to his defense of insanity.

Had the court given the proper instructions pertaining to the defense of insanity, we do not believe the jury would have convicted the defendant of murder, and if they had convicted the defendant at all, it perhaps would have been on the charge of first degree manslaughter. The court should have given an instruction including the irresistible impulse test, and the failure to do so resulted in denial of due process in this case. The trial court made an effort to give an instruction embodying the "right and wrong test," but as has been pointed out in the first assignment herein, it failed to properly submit this test.

The right and wrong test is now the law in all states except New Hampshire, and in seventeen states, the right and wrong rule has been supplemented by the irresistible impulse test.

In *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193 (1886), the Alabama court considered the right and wrong test as being outmoded. We lift from this opinion the following:

> "The question then presented seems to be, whether an old rule of legal responsibility shall be adhered to,

based on the theories of physicians promulgated a hundred years ago, which refuses to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong—or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. * * *

"It is everywhere admitted, and as to this there can be no doubt, that an idiot, lunatic, or other person of diseased mind, who is afflicted to such extent as not to know whether he is doing right or wrong, is not punishable for any act which he may do while in that state.

"Can the courts justly say, however, that the only test or rule of responsibility in criminal cases is the power to distinguish right from wrong, whether in the abstract, or as applied to the particular case? Or may there not be insane persons, of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as matter of fact, so far under the *duress of such disease* as to destroy *the power to choose* between right and wrong? Will the courts assume as a fact, not to be rebutted by any amount of evidence, or any new discoveries of medical science, that there is, and can be no such state of the mind as that described by a writer on psychological medicine, as one 'in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former, nor abstain from the latter'? Dean's Med. Jur. 497.

"Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from

that of the court in the trial of a case of this character. The province of the jury is to determine facts, that of the court to state the law. The rule in *M'Naghten's* case arrogates to the court, in legal effect, the right to assert, as matter of law, the following propositions:

"(1) That there is but a single test of the existence of that degree of insanity, such as confers responsibility for crime.

"(2) That there does not exist any case of such insanity in which that single test—the capacity to distinguish right from wrong—does not appear.

"(3) That all other evidences of alleged insanity, supposed by physicians and experts, to indicate a destruction of the freedom of the human will, and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

"The whole difficulty, as justly said by the Supreme Judicial Court of New Hampshire, is, that 'courts have undertaken to declare that to be law which is *matter of fact*.' If, observes the same court, 'the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself to be qualified to testify as an expert.'—*State* v. *Pike*, 49 N. H. 399. * * *

"It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *M'Naghten's* case, *supra*, is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself. The practical trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals—where, in other words, the border line of punishability is adjudged to be passed.

But, as has been said in reference to an everyday fact of nature, no one can say where twilight ends or begins, but there is ample distinction nevertheless between *day* and *night* * * *

"Several rulings of the court; including especially the one given *ex mero motu*, and the one numbered five, were in conflict with this view, and for these errors the judgment must be reversed. The charges requested by defendant were all objectionable on various grounds. Some of them were imperfect statements of the rules above announced; some were argumentative, and others were misleading by reason of ignoring one or more of the essentials of criminal irresponsibility, as explained in the foregoing opinion * * *

"In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly from what we have said, that the inquiries to be submitted to the jury then, in every criminal trial where the defense of insanity is interposed, are these:

"(1) Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a *disease of the mind*, so as to be either idiotic, or otherwise insane?

"(2) If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

"(3) If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

"1. If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

"And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely * * *

"The judgment is reversed and the cause remanded. In the meanwhile the prisoners will be held in custody until discharged by due process of law."

For further authorities supporting the irresistible impulse test, see the following:

Hankins v. *State*, 133 Ark. 38, 201 S. W. 832;
Ryan v. *People*, 60 Colo. 425, 153 P. 756;
People v. *Lowhone*, 292 Ill. 32, 126 N. E. 620;
State v. *Keerl*, 29 Mont. 508, 75 P. 362;
Doherty v. *State*, 73 Vt. 380, 50 A. 1113;
Smith v. *U. S.*, 36 F. 2d 548, 70 A. L. R. 654.

The New Hampshire rule is embodied in the following instruction:

"If the defendant killed in a manner that would be criminal and unlawful, if the defendant were sane, the verdict should be not guilty by reason of insanity, as the killing was the offspring or product of mental disease in the defendant."

See *State* v. *Pike*, 49 N. H. 399, and *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242.

The New Hampshire rule has been followed in the District of Columbia in *Durham* v. *U. S.*, 214 F. 2d 862. In this case, the District of Columbia court went further and stated that an accused is not criminally responsible if his unlawful act was a product of mental disease or mental defects.

In the *Durham* case, the defendant was convicted of house-breaking after having interposed a defense of unsound mind at the time of the crime. He had a long history of imprisonment in penal institutions and hospitalization in mental institutions, and we quote the following from the body of this opinion:

> "It has been ably argued by counsel for Durham that the existing tests in the District of Columbia for determining criminal responsibility, i. e., the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility. We are urged to adopt a different test to be applied on the retrial of this case. This contention has behind it nearly a century of agitation for reform.
>
> "A. The right-wrong test, approved in this jurisdiction in 1882, was the exclusive test of criminal responsibility in the District of Columbia until 1929 when we approved the irresistible impulse test as a supplementary test * * *. The right-wrong test has its roots in England. There, by the first quarter of the eighteenth century, an accused escaped punishment if he could not distinguish 'good and evil,' i. e., if he 'doth not know what he is doing, no more than * * * a wild beast.' Later in the same century, the 'wild beast' test was abandoned and the 'right and wrong' and was substituted for 'good and evil.' And toward the middle of the nineteenth century, the House of Lords in the famous *M'Naghten* case restated what had become the accepted 'right-wrong' test in a form which has since been followed, not only in England but in most American jurisdictions as an exclusive test of criminal responsibility:
>
> > "* * * the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be re

> sponsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

"As early as 1838, Isaac Ray, one of the founders of the American Psychiatric Association, in his now classic Medical Jurisprudence of Insanity, called knowledge of right and wrong a 'fallacious' test of criminal responsibility. This view has long since been substantiated by enormous developments in knowledge of mental life. In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine: 'Everyone concedes that the present (legal) definition of insanity has little relation to the truths of mental life.'

"Medico-legal writers in large number, The Report of the Royal Commission on Capital Punishment 1949-1953, and The Preliminary Report by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry present convincing evidence that the right-and-wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity.' The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior * * *

"By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

"The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence. As the Royal Commission emphasizes, it is dangerous 'to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible * * *' In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines.

"'Despite demands in the name of scientific advances, this court refused to alter the right-wrong test at the turn of the century. But in 1929, we reconsidered in response to 'the cry of scientific experts' and added the irresistible impulse test as a supplementary test for determining criminal responsibility. Without 'hesitation' we declared in *Smith* v. *United States*, it to be the law of this District that, in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of irresistible impulse, the jury should be so charged.' * * *

"* * * We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the 'irresistible impulse' test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.

"B. In the District of Columbia, the formulation of tests of criminal responsibility is entrusted to the courts and, in adopting a new test, we invoke our inherent power to make the change prospectively.

"The rule we now hold to be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simple that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

"We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

"Whenever there is 'some evidence' that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such

abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case * * *

"The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility. The rule we state in this opinion is designed to meet these requirements.

"Reversed and remanded for a new trial * * *."

New Mexico in the case of *State* v. *Morris*, 76 P. 2d 19, adopted its rule in the following language:

"The jury must be satisfied that at the time of committing the act, the accused as a result of disease of mind * * *

(a) Did not know the nature and quality of the act, or

(b) Did not know that it was wrong, or

(c) Was incapable of preventing himself from committing it."

It was important that the trial court in the case at bar give the proper instruction on insanity as is evidenced by the testimony introduced on behalf of the State of Oklahoma by its psychiatrist, DR. MOORMAN PROSSER (R. 158

and 461) wherein he stated in answer to a question propounded by the State's attorney if the doctor had an opinion as to whether or not the defendant knew right from wrong, and knew the consequences of his act when he beat and killed the deceased on May 8th:

> "It is my opinion that he did, and I have reasons to substantiate it. They repress it. An act which is detrimental to their own status and position can be more effectively forgotten by them than by an average person. All of us repress and forget things we do not wish to remember, but they can do it more completely and effectively than the average person."

This was the opinion expressed by Dr. Prosser, although he never saw or conferred with the petitioner except on one occasion for a period of time of about four minutes; as a result of which in our opinion his conclusion should be given very little if any probative value.

And from the testimony of the psychiatrist introduced by the defendant, DR. KIMFERER, when he stated in answer to the question as to whether or not the defendant knew the difference between right and wrong at the time of the offense and if he knew the probable consequences of his acts (R. 287-289):

> "I feel that he was unable to distinguish between right and wrong. No, I don't think he did. (know the probable consequences of his acts)."

This doctor testified that he drew these conclusions after examining the defendant, and as a result of his consultations with him.

Also, the testimony of DR. R. S. WILSON, a clinical psychologist who testified on behalf of the defendant in response to the question as to whether or not the defendant did or did not at the time and place have the ability to distinguish between right and wrong and had the ability to comprehend the nature and probable consequences of his act, answered (R. 301):

"He did not."

The position of the petitioner herein on this assignment of error cannot be better stated or summarized than in the language of the Honorable Simon E. Sobeloff, former Solicitor General of the United States, in his scholarly address delivered in May, 1955 to the National Conference of Bar Counsels of Washington, D. C., reported in the American Bar Association Journal of September, 1955, Vol. 41, p. 793, wherein he reviewed at length the history of the defense of insanity in criminal matters, discussing the McNaghten rule and the New Hampshire rule as well as the decision in the *Durham* case, decided by the court of the District of Columbia. In this dissertation, Judge Sobeloff quoted Mr. Justice Frankfurter of the United States Supreme Court in testifying before the British Royal Commission on capital punishment as follows:

> "The M'Naghten Rules were rules which the judges in response to questions by the House of Lords formulated in the light of the then existing psychological knowledge * * * I do not see why the rules of law should be arrested at the state of psychological knowledge at the time when they were formulated * * *.

> If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think the real situation, certainly with us—they are honoured in the breach and not in the observance—then I think the law serves its best interests by trying to be more honest about it * * * I am a great believer in being as candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them' * * * I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules."

We respectfully submit that the Oklahoma court denied due process to the petitioner herein in failing and refusing to properly charge the jury as to the law governing his defense of insanity.

We acknowledge that the Oklahoma court has not recognized the irresistible impulse test as being proper in defining a defense of insanity. *Cunningham* v. *State*, 70 Okl. Cr. 131, 105 P. 2d 264. *Roe* v. *State*, 17 Okl. Cr. 587, 191 P. 1048. Nevertheless, the guarantees of the 14th Amendment are substantive, not merely procedural, and where a state court has violated substantive rights, due process has been denied, and such is a proper subject for review by the Federal courts. *Smith* v. *B. J. Rhay, Superintendent, Washington State Penitentiary*, 254 F. 2d 306. Where questions as to the rights of an accused secured under the provisions of the 14th Amendment are raised

on appeal in a criminal case, the state court should look to the decisions of the United States Supreme Court for proper construction of those provisions:

> *State* v. *Palko*, 122 Conn. 529, 191 A. 320, 113 A. L. R. 628, affirmed 58 S. Ct. 149, 302 U. S. 319, 82 L. Ed. 288.

No trial can be fair so as to satisfy the requirement of this Amendment which leaves defense upon a criminal charge to the man who is insane, unaided by counsel and who by reason of his mental condition stands helpless and alone before the court.

> *Massey* v. *Moore* (Tex., 1954), 75 S. Ct. 145, 348 U. S. 105, 99 L. Ed. 135.

By the same rule, an insane person charged with a crime stands just as helpless when the court either gives an erroneous charge to the jury or fails to give proper instructions on his defense of insanity.

A denial by a state court of rights or privileges specifically embodied in this amendment may, in certain circumstances operate to deprive a person of due process of law in violation of the 14th Amendment.

> *Ex parte Lee*, 217 F. 2d 647, Cer. Den. 75 S. Ct. 538, 348 U. S. 975, 99 L. Ed. 7600.

The provision in Amendment 14 is applicable to a state's action in judicial proceedings and is intended to secure fundamental fairness.

> *State* v. *Hedgebeth* (1947), 228 N. C. 259, 45 S. E. 2d 563, Cer. Dismissed 68 S. Ct. 1185, 334 U. S. 806, 92 L. Ed. 1139.

Thus, it would appear that even though the Oklahoma Court has not embodied the irresistible impulse theory in determining the degree of insanity that would excuse a person from the commission of a crime, nevertheless, in view of the foregoing authorities, we believe that its failure to do so has worked a denial of due process of law since this test is included in addition to the right and wrong test which Oklahoma has followed as well as in a great number of the states of the Union as to the extent that it has become and should be considered the "law of the land."

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3. Due process has been denied to petitioner in that the trial court permitted perjured testimony to be used against him in the trial of the cause.

State's witness, HOPE PENA, testified in the trial of this case before a jury (R. 25-27) as follows:

Q. Now you testified a while ago about Joe kicking and beating her as she went from the couch in through the door.

A. Yes sir.

Q. You didn't say a word about that at the preliminary, did you?

A. No sir, I didn't.

Q. Why didn't you?

A. I don't know; it seemed awful to me, the way he did it.

Q. But you didn't tell the court at the preliminary one word about any kicking, did you?

A. No sir, I didn't."

This witness who testified at the preliminary trial gave no testimony whatsoever in regard to the defendant having kicked or beaten the deceased. A record was taken of her testimony at the preliminary hearing and introduced at the time the petitioner herein presented his motion for a new trial before the District Court in which he had been convicted by a jury (R. 496 a to r).

The State's attorney in presenting this additional evidence before the jury trial evidently must have known what the answers to the questions which he propounded to the witness would be; otherwise, he would not have asked them. The prosecuting attorney also knew at that time what this same witness had testified to previously at the preliminary trial, and must have known that she did not give such testimony at the first hearing. The defendant and his counsel knew nothing about his additional testimony which the witness gave in response to the questions of the State's attorney at the jury trial, and they could not anticipate that she would give evidence different than that which she had previously testified to under oath upon preliminary examination.

The reception of this evidence over the objection of the defendant by the trial court, which conduct was later approved by the Oklahoma Appellate Court and was so fundamentally unfair as to violate the principles of justice and fair dealing, guaranteed under the due process provisions of our Constitution.

This witness did not tell the truth at both trials. On one or the other occasion, her testimony was false. And it appears that this added testimony given by her was not true. It was highly damaging to this defendant, and went towards establishing the crux of the facts which the State alleged was the cause of the death of the victim.

Our courts do not countenance the reception of false testimony in convicting one charged with a crime.

Convictions obtained by use of perjured testimony are null and void under the due process clause.

> *Skipper* v. *Schumacher*, 124 Fla. 384, 169 So. 58, Cer. Den. 1936, 57 S. Ct. 39, 29 U. S. 507, 81 L. Ed. 376.

If a state, whether by active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law.

> *Hysler* v. *State of Fla.* (1942), 62 S. Ct. 688, 315 U. S. 411, 86 L. Ed. 932, affirming one So. 2d 628, 146 Fla. 593, Cer. granted 1941, 61 S. Ct. 1113, 313 U. S. 557, 85 L. Ed. 1518.

Where falsity of perjured testimony upon which conviction was obtained is discovered after the conviction as well as where the testimony was known to be perjured when presented, the state must afford corrective judicial process.

> *Jones* v. *Commonwealth of Kentucky* (C. C. A., Ky., 1938), 97 F. 2d 335.

It is stated in the case of *Palakiko et al.* v. *Hawaii*, 188 F. 2d 58, Syllabus 6:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness of the use of the evidence whether true or false. Constitution Amendments 5, 14."

Citing *Lisenba* v. *California*, 314 U. S. at page 236, 62 S. Ct. at page 290, 86 L. Ed. 166:

> "We respectfully urge that the petitioner herein was denied due process by the introduction of this testimony against him in the trial of this cause."

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4. Due process has been denied the petitioner in that the punishment assessed against him is wholly unreasonable and disproportionate to the crime proven against him under the evidence in this case, and is excessive.

The petitioner was sentenced to life imprisonment for the crime of murder. This sentence is within the limits prescribed by the Oklahoma Statutes for this offense. However, under the evidence in this case, the petitioner we submit would be guilty of nothing more than manslaughter in the first degree which carries a punishment of confinement in the penitentiary for not less than four years.

Title 21 O. S. A. 711 defines manslaughter in the first degree as follows:

> "Homicide is manslaughter in the first degree in the following cases:

1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.

2. When perpetrated without a design to effect death and in a heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon; unless it is committed under such circumstances as to constitute excusable or justifiable homicide.

3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed."

Title 21 O. S. A. 701 defines murder as:

"Homicide is murder in the following cases—

1. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being.

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death by a person engaged in the commission of a felony."

The information in this case (R. 5) charges the petitioner with:

"Wilfully, unlawfully, seriously and maliciously and without authority of law and with the premeditated design then and there to effect the death of one Mary Elizabeth Revard, make an assault at and upon the said Mary Elizabeth Revard by means and use of a dangerous and deadly weapon, to wit: hands and feet—by stomping and beating the said Mary Elizabeth Revard, then and there inflicting upon the body

of her mortal wounds of which said mortal wounds she, the said Mary Elizabeth Revard, then and there did die on the 8th day of May, 1957 as intended by him, the said defendant."

Title 21, O. S. A. 702 provides:

"A design to effect death is inferred from the fact of killing unless the circumstances raise a reasonable doubt whether such design existed."

Title 21 O. S. A. 703 defines premeditation as:

"A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution."

One committing homicide while so intoxicated as to be incapable of forming a premeditated design to kill, and who had formed no purpose to commit the crime before his intoxication is not guilty of murder, but only of manslaughter in the first degree.

Beshirs v. *State*, 14 Okl. Cr. 578, 74 P. 577;
Cheadle v. *State*, 11 Okl. Cr. 566, 149 P. 919.

The utmost effect of intoxication as defense in homicide prosecution is extenuation of crime for murder to manslaughter.

Skeen v. *State*, 61 Okl. Cr. 188, 66 P. 1106.

Intoxication such as will reduce a homicide from murder to manslaughter in the first degree is such as to render defendant incapable of forming a design to effect death.

Chambers v. *State*, 16 Okl. Cr. 238, 182 P. 714
Updike v. *State*, 9 Okl. Cr. 124, 130 P. 1107

In the case of *Leon C. Jordan* v. *State of Oklahoma*, 327 P. 2d 708, the defendant was charged with the crime of murder and was convicted by a jury of the offense of manslaughter in the first degree, and his punishment fixed at eight years in the penitentiary. The State's evidence disclosed the homicide was the result of intoxication on the part of both the deceased and the defendant.

The Criminal Court of Appeals of Oklahoma in affirming this conviction stated in the body of the opinion:

> "On this state of facts, the jury's verdict indicates extreme leniency, not prejudice. The case would have supported a much greater penalty. Only because of the splendid representation of counsel, and the defendant's quarrelsome and evil disposition when drinking did the defendant escape with a lesser penalty."

The petitioner does not contend that the punishment of life imprisonment which he received for the crime of murder is excessive for this offense, but he does contend that under the evidence and all the facts and circumstances in this case, he was guilty—if guilty at all—of nothing more than first degree manslaughter as defined by the Oklahoma Statutes, and that the punishment which he received exceeds the just punishment for the offense which he committed.

In the case of *St. Louis, Iron Mountain and Southern Railway Company* v. *Sicksey Williams*, 251 U. S. 63, 67, 64 L. Ed. 139, 141, this Court recognized that a state may deny due process by enacting statutes that prescribe a penalty so severe and oppressive as to be wholly disproportion-

ate to the offense, and obviously unreasonable. So applying this principle to the interpretation of state statutes when applied to the evidence introduced in the trial of one charged with homicide, a conviction and punishment therefor, may be so severe and oppressive as to be wholly disproportionate to the offense committed as disclosed by the evidence, and therefore obviously unreasonable. Under such circumstances, one convicted would just as surely be denied due process of law.

By this same rule, petitioner Revard has, by the administration of the punishment imposed upon him in the case at bar received a penalty which is unreasonable, oppressive and disproportionate to the offense actually committed by him—manslaughter in the first degree, that it amounts to punishment in violation of the due process clause.

The due process clause of our national Constitution governs any action of the state, whether through its legislature, its courts, or its executive or administrative officers.

> *Mooney* v. *Holohan* (Calif., 1935), 55 S. Ct. 340, 294 U. S. 103, 79 L. Ed. 791, 98 A. L. R. 406. Rehearing denied 1935, 55 S. Ct. 511, 294 U. S. 732, 79 L. Ed. 1261;
> *Fleenor* v. *Hammond* (C. C. A., Ky., 1941), 116 F. 2d 982.

This amendment is not limited as to the form in which or the agency by which the state may act in denying due process, any such action whether by executive, legislative

or judicial agency coming within its protection. *Owens v. Battenfield* (C. C. A. Okl., 1929), 33 F. 2d 753, Cer. Den. 1929, 50 S. Ct. 88, 280 U. S. 605, 74 L. Ed. 649. It is held in this case that the fact that four of five State Supreme Court Judges of Oklahoma did not read evidence in the record before joining in the affirmance of the judgment sought to be enjoined was not such arbitrary or capricious exercise of power as to constitute a denial of due process of law so as to authorize the Federal Court to restrain the enforcement of the judgment.

CONCLUSION

By this petition we have pointed out four cogent reasons, which, if considered separately, would require that this Court grant certiorari:

1. Denial of due process by the trial court's erroneously giving Instruction No. 11, later affirmed by the Criminal Court of Appeals of Oklahoma.

2. Denial of due process by the failure of the trial court to give proper instructions relating to the petitioner's defense of insanity.

3. Denial of due process in that the trial court permitted perjured testimony to be used against the petitioner in the trial of this cause.

4. Denial of due process in that the punishment assessed of life imprisonment is wholly unreasonable and disproportionate to the crime proven against the petitioner

under the evidence in this case, and the punishment is excessive.

We earnestly and respectfully submit that for each of the reasons presented herewith a writ of certiorari should issue to the Criminal Court of Appeals of the State of Oklahoma.

Respectfully submitted,

JOSEPH ARNOLD REVARD,
Petitioner,
Oklahoma State Penitentiary,
McAlester, Oklahoma.

O. B. MARTIN,
208 Leonhardt Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

APRIL, 1959.

APPENDIX A

"FILED IN CRIMINAL COURT OF APPEALS
OF OKLAHOMA

November 19, 1958

ANDY PAYNE, Clerk

IN THE CRIMINAL COURT OF APPEALS
OF THE STATE OF OKLAHOMA

No. A-12642

JOSEPH ARNOLD REVARD,

Plaintiff in Error,

VERSUS

THE STATE OF OKLAHOMA,

Defendant in Error.

"SYLLABUS

"1. Section 152 of Title 21, O. S. A., Penal Code, provides: 'All persons are capable of committing crimes, except those belonging to the following classes: "* * * Fourth: Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.' HELD, that under this provision the test of criminal responsibility for committing an act which is declared to be a crime *is fixed at the point where the accused has mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act.*

"2. A man who has sufficient reason to know that the act he is doing is wrong and deserved punish-

ment is legally of sound mind and is criminally responsible for his acts.

"3. Where no objection is made or exception taken to the instructions given by the court and, no request for instructions are made, error cannot be predicated upon the failure of the court to give any particular instruction.

"4. Where the testimony of the psychiatrist and psychologist testifying for the defendant was broad enough to have justified the giving of an instruction covering 'irresistible impulse,' if such theory had been subscribed to in this jurisdiction, but such not being recognized, it was not error for the court to fail to give an instruction to the jury covering such theory.

"5. And where counsel for the defendant objected to the expert rebuttal witness for the State testifying concerning the 'irresistible impulse' theory, for the reason that 'there is no irresistible impulse of any kind in this case. It is not the law in Oklahoma,' such state of facts precludes this court from reviewing the question attempted to be raised for the first time in this court on appeal.

"6. White dress worn by deceased and unsoiled just prior to her being found nude on floor with defendant standing over her with left foot on her body, and same white dress in a soiled condition lying on the floor near by, was admissible in evidence, the medical evidence being that deceased died of multiple traumatic injuries which involved particularly the head, chest, abdomen, and where there were marks on body from head to foot.

"7. Where on trial, on cross examination witness candidly admitted that she had not at preliminary hearing related all that she witnessed between defendant and his deceased wife just prior to her death, but related same at trial, such testimony

was admissible. Counsel to emphasize the delay could have offered the record made at preliminary hearing.

"8. Where there is a question as to what caused the death of deceased, and there are many bruises over the body of the deceased shown to have been inflicted by defendant, photographs of body were admissible in evidence to illustrate or clarify the issue, where such photographs were shown to be faithful reproductions of what they purported to represent.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA.

Clarence Mills, Judge

"Joseph Arnold Revard was convicted of the crime of murder, his punishment fixed at life imprisonment in the State Penitentiary, and he appeals. AFFIRMED.

Granville Scanland, Oklahoma City, Okla., Attorney for Plaintiff in Error.

Mac Q. Williamson, Attorney General, Sam H. Lattimore, Ass't Att'y General, Attorneys for Defendant in Error.

POWELL, JUDGE:

"The defendant-appellant was tried before a jury in the District Court of Oklahoma County and convicted of the crime of murder, and punishment was fixed by the jury at life imprisonment in the State Penitentiary. Defendant's defense was insanity at the time of the offense. The victim was his wife. The information charged that death was accomplished by use of hands and feet, by stomping and beating, resulting in the infliction of mortal wounds. The jury by reason of the verdict rejected defendant's contention that he was insane at the time of the commission of the acts charged. Following the verdict, counsel

filed a motion in arrest of judgment, alleging the then insanity of the defendant, whereupon the court on November 29, 1957 ordered defendant to the Eastern State Hospital, Vinita, Oklahoma, for observation not exceeding ninety days. Thereafter, on December 16, 1957 the court issued an order for the return of defendant from the hospital, based on a report of the medical staff that defendant was found to be without mental disorder. Following this, and on February 17, 1958 a jury was empanelled to try the sanity or insanity of the defendant, and the verdict of the jury was that he was sane. Thereupon defendant's motion for new trial was heard and overruled and the court entered judgment in accordance with the verdict of the jury.

"For reversal the specifications of error set out in petition in error are reduced to five propositions in brief, and will be treated in the order presented.

"The sufficiency of the evidence is not challenged, and although we have summarized nearly five hundred pages of evidence which while not a part of this opinion, is being filed in the case, we call attention here to pertinent points throwing light on the propositions raised.

"Mary Revard died from a fracture of the skull and broken ribs or as stated by the physician performing the autopsy, death was due 'to multiple traumatic injuries which involved particularly the head, chest and abdomen.' One witness saw defendant kicking and beating his wife in the hallway outside of their apartment, and others heard the noise; officers found defendant in the room with his wife's nude body on the floor; officers thought defendant drunk; there was evidence that the wife had been intoxicated and that she and defendant had been on a drinking spree for days, but defendant claimed that on the day of the homicide he had but two drinks.

"Defendant testified to five marriages commencing when he was but 17 years of age, two of the marriages being common law. By his own testimony he had difficulty with all of his wives, and drank heavily with them of alcoholic beverages. He would always 'black out' when it was shown that a wife had been injured or when he beat two men each past 70 years, and a woman 79, and he would not remember. He beat a sister upon whom he depended for financial aid because she wanted him to get to school on time.

"The State on rebuttal showed that defendant had never attacked his victims when there were those present who might have prevented it.

"Expert witnesses for defendant thought he was unable to determine right from wrong, or know the probable consequences of his acts. And there was evidence that if defendant did know right from wrong, that it was impossible for him to resist the impulse to do what he did.

"An expert for the State thought from a hypothetical question, which was a history of defendant's conduct, that he knew right from wrong, and the consequences of his acts. He was not permitted on rebuttal over objections of defense counsel, to go into the matter of 'irresistible impulse.'

"Many non-expert witnesses testified. No objections were interposed to the instructions given by the court, and no additional instructions were requested. The jury found the issues against the defendant.

"It is first asserted that the court erred in its instruction No. 11 with reference to insanity. The instruction reads:

> "'You are instructed that an insane person is not responsible criminally for his acts committed when such mental condition existed. The test of criminal responsibility for acts which would ordinarily be criminal under the law is:

> "'The mental ability or capacity to distinguish between right and wrong as applied to the particular act, *AND* to understand the nature and probable consequences of such act; that is to say, the capacity to know right from wrong, *AND* to know then that the particular act, alleged to have been committed, was 'wrong' (Emphasis supplied)'.

"We note from the record that no exceptions were made to instruction No. 11, nor did defense counsel offer any different instructions. The general rule is that instructions given by the court and not excepted to at the trial or before the trial court will not be reviewed on appeal, unless fundamental error is apparent. Counsel claims fundamental error.

"It is argued that the error comes about by the court using the conjunctive word 'and,' instead of the correlative 'or.'

"It is urged that the test in Oklahoma where the defense of insanity is interposed is commonly known as the 'right and wrong' test, which had its beginning in the celebrated *McNaughton* case (House of Lords. 1843. 10 Clark and Fin. 200).

"In the *McNaughton* case the judges pointed out that 'the jurors ought to be told in all cases that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; *OR*, if he did know it that he did not know he was doing what was wrong' (Emphasis supplied). See annotation in 70 A. L. R. p. 659, and 45 A. L. R. 2d, p. 451.

"It is said that this court has never actually followed the *McNaughton* rule by reason of the use of the word 'and' instead of 'or' and hence has been in error.

"The effect of defendant's argument is to point out that the *McNaughton* rule above quoted actually has

two branches, and that under such rule the accused is to be held not criminally responsible where he does not know the nature and quality of his act as well as where he does not know right from wrong with respect to the act.

"It is further stated that our Legislature has failed to say what insanity is, and has failed to lay down any test of insanity as a defense of criminal charges. Here, however, we would point out that we do have statutory provisions that have guided the territorial Supreme Court and the Criminal Court of Appeals in many cases over a period of over fifty years in evolving the test in Oklahoma in determining responsibility for the commission of a crime, and it is: to determine whether the accused knew right from wrong in respect to the act in question, and understood the nature and consequences of such act.

"See 22 O. S. A. §1161, reading:

> " 'An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense, while he or she, as the case may be, is insane. * * *'

"And in this connection see the fourth sub-division of 21 O. S. A. §152, defining those persons capable of committing crimes, except the following:

> " '4. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, *upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness*' (Emphasis supplied).

"In the following cases the question raised has been treated at some length, and we find it unnecessary to here repeat: *Maas* v. *Territory* (1901), 10 Okl. 714, 63 P. 960, 53 L. R. A. 814; *Turner* v. *Territory* (1905), 15 Okl. 557, 72 P. 650; *Alberty* v. *State*, 10 Okl. Cr. 616, 140 P. 1025, 52 L. R. A. (N. S.) 248;

Smith v. *State*, 12 Okl. Cr. 307, 155 P. 699; *Owen* v. *State*, 13 Okl. Cr. 195, 163 P. 548; *Roe* v. *State*, 17 Okl. Cr. 587, 191 P. 1048; *Kennamer* v. *State*, 59 Okl. Cr. 146, 57 P. 2d 646; *Merrick* v. *State*, 56 Okl. Cr. 88, 34 P. 2d 281; *Gallagher* v. *State*, 81 Okl. Cr. 15, 159 P. 2d 562; *Berryman* v. *State* (Okl. Cr.), 283 P. 2d 558.

"There are many other cases from this court that might be cited and where the instruction given as to insanity as a defense was substantially as the instruction given in the within case.

"The Attorney General argues:

> " 'The instruction as given by the court states the rule with reference to insanity in the form and language uniformly followed by this court in all insanity matters. The instruction sets forth two conditions which must exist in order for the defendant to be criminally responsible. In the first place, the defendant must have the mental capacity to distinguish between right and wrong, as applied to the particular act. In the second place, he must have had the capacity to understand the nature and probable consequences of the act. It naturally follows that if the defendant appears not to have had the mental capacity to distinguish between right and wrong, or if he did not have the capacity to understand the nature of the consequences of his act, he is not criminally responsible.'

"We conclude that the instruction complained of is not abhorrent to the statutory provisions mentioned, and is in accordance with the rule early adopted by this court. We are not convinced that there is justification for changing the test complained of at this time, in view of the conflict in medical as well as legal opinion.

"In his second specification of error defendant contends that the trial court should have instructed the jury upon the 'irresistible impulse' theory of defense.

"We do not find from the record where defendant requested the court to give such an instruction. We have from the early history of this court said that where no objection is made or exceptions taken to instructions given by the court, and no request for instructions is made, error cannot be predicated on failure of court to give any particular instruction. *Johnson* v. *State*, 52 Okl. Cr. 86, 2 P. 2d 601; *Gentry* v. *State*, 86 Okl. Cr. 92, 189 P. 2d 626; *Estes* v. *State*, 95 Okl. Cr. 209, 242 P. 2d 459; *Cherry* v. *State* (Okl. Cr.), 276 P. 2d 280. And while it is true that the testimony of the psychiatrist and psychologist testifying for the defendant was broad enough to have justified such an instruction, if such a theory was subscribed to in this jurisdiction, counsel no doubt well knew that such theory was not recognized by this court and hence the failure to request such an instruction. We say this because the County Attorney in an effort to rebut the testimony of the two expert witnesses for the defendant asked on redirect examination of Dr. Moorman Brossesr, psychiatrist, testifying for the State:

"Q. (By MR. THEUS [assistant County Attorney]): 'Doctor. I believe Mr. Scanland was making some reference to the theory about which Dr. Kinerer, testified, the theory of what has been identified here as irresistible impulse.

MR. SCANLAND: 'There is no irresistible impulse of any kind in this case. It is not the law in Oklahoma.

THE COURT: 'That will be sustained and the jury is instructed to disregard the question.'

"In *Roe* v. *State*, 17 Okl. Cr. 587, 599, 191 P. 1048, Matson, J., for this court said:

"'An entire volume might be written on the law of insanity. Some states recognize and apply the doctrine of "irresistible impulse," otherwise sometimes called the "new rule." Other states follow strictly the English or old rule. The au-

thorities on this subject, therefore, are in irreconcilable conflict. *If the irresistible impulse doctrine is to apply in this State, then the Legislature must amend the Statute.* Until that time persons charged with crime, who interpose the defense of insanity, must be held criminally responsible for their acts if at the time of their commission they were capable of knowing the wrongfulness of their acts and to understand the nature and consequences of them. A person possessing such a degree of mentality cannot be held exempt from criminal responsibility in this State merely because of some alleged irresistible impulse on his part to do the act.

" 'The Statute of this State does not recognize the doctrine that one may be so possessed with an uncontrollable impulse as to compel him to do what he knows to be wrong and a crime, and yet be relieved from all criminal responsibility. A condition might be conceived of an uncontrollable insane impulse sufficient to relieve one of criminal responsibility under our statutes; but this would only arise when the diseased condition of the accused's mind was such as to destroy the power of the accused to comprehend the nature and consequences of the particular act, and to know that it was wrong at the time of its commission.'

"Counsel's objection, as we see from the above case, was good, even though his expert witnesses had in answer to hypothetical questions given support to the validity of the claim that a person while knowing right from wrong might be possessed of an irresistible impulse due to disease of the mind, to do a certain act. But he objected to the expert witness for the State going into the subject, thus precluding this court from reviewing the question even if it was inclined so to do.

"We therefore conclude that the trial court did not err in failing to give the instruction complained of, and the question, under the facts stated, is not entitled to review on the merits.

"It is next urged that the court erred in admitting in evidence a dress worn by the deceased. An objection was made but nothing was shown to support such objection. On the other hand, the State had shown by Hope Pena that the dress in question was being worn by the victim in the hallway of the rooming house just prior to the time she entered her apartment with the defendant, and it was clean and had no stains, whereas the opposite was true when the nude body of Mary Revard was found on the floor of her one-room apartment, where defendant was seen with his left foot on her body and the dress on the floor. And we have held that ordinarily the admission of such evidence is within the sound discretion of the trial court. Gloves or other clothing worn by a deceased at the time of the homicide were held admissible in *Morris* v. *State*, 6 Okl. Cr. 20, 115 P. 1030; and *Saunders* v. *State*, 4 Okl. Cr. 265, 111 P. 965. See also *January* v. *State*, 16 Okl. Cr. 166, 181 P. 514; *Seals* v. *State*, 92 Okl. Cr. 272, 222 P. 2d 1037.

"It is next said that the conviction should be reversed because of the fact that a witness for the State, Hope Pena, testified at the trial with reference to the defendant having kicked and beaten the deceased, whereas the witness did not testify to such effect at the preliminary hearing. The witness was asked about such matter at the time of her testimony at the trial, and admitted that she had not mentioned such kicking in her testimony at the preliminary hearing. She was a 15-year old girl, Mexican-American. She had said on cross-examination in answer to the question why she had not told about the kicking while testifying at the preliminary: 'I don't know; it seemed awful to me the way he did it.'

"If counsel had desired to impeach the witness by the testimony at the preliminary, he should have offered the transcript of such testimony at the trial, but due to the frank admission of the witness counsel apparently decided not to do so. However, the jury had for consideration the entire testimony of Hope Pena at trial and no doubt weighed it in connection with the admission developed by the cross-examination by counsel for the defendant.

"We find no error in the ruling of the trial court.

"It is finally urged that the court should not have admitted certain photographs of the body of the deceased, but has failed to advance any meritorious reason in support of such proposition. It is true that the photographs showed the nude body of the deceased, but this was necessary, to show the bruises from the toes to the skull. The autopsy developed that there was a fractured skull, many broken ribs, and the body showed evidence of other serious injuries, and while the pathologist testified that the skull fracture possibly could have by itself have caused death, it was his opinion that 'death was due to multiple traumatic injuries which involved particularly the head, chest, abdomen.' Such photographs have been held admissible since the early history of this court. See *Morris* v. *State*, 6 Okl. Cr. 29, 115 P. 1030; *Langley* v. *State*, 90 Okl. Cr. 310, 213 P. 2d 886; *Porter* v. *State*, 76 Okl. Cr. 16, 133 P. 2d 903; *Mott* v. *State*, 94 Okl. Cr. 145, 232 P. 2d 166.

"By reason of what has been said, the judgment complained of must be, and is affirmed.

BRETT, P. J., and NIX, J., concur."

IN THE CRIMINAL COURT OF APPEALS
OF THE STATE OF OKLAHOMA

No. A-12642

JOSEPH ARNOLD REVARD,

Plaintiff in Error,

VERSUS

THE STATE OF OKLAHOMA,

Defendant in Error.

RESUME OF EVIDENCE

POWELL, JUDGE:

"Although the sufficiency of the evidence is not challenged in this appeal, we shall set out a resume as briefly as may be, of the voluminous record to aid a better understanding as we proceed to treat the issues.

"The State produced evidence to show that Joseph Arnold Revard and his common law wife Mary lived in a one-room apartment on the second floor at 14 1/2 West Grand, Oklahoma City. Their room was at the front of the building. Dan Pena, a leather worker, his wife and 15-year old daughter Hope, lived in an apartment at the rear of the hall. At about 4 P. M. on May 8, 1957, Hope Pena was sitting on a couch in the hallway, writing a letter. The defendant passed by her on his way down stairs. Defendant came back in about five minutes and returned to his room, but in about ten minutes he passed her again and she was still writing, and defendant, who knew that she had an out-of-town boy friend, said: 'Tell him we love him too,' and went on down stairs again, and soon Mary, his wife, came out in the hall and went to the wash room, which was to the rear. She had on a white dress, the dress at that time looked clean and was not torn. Mrs. Revard had to brace herself by putting her hands on the wall going to and from the

wash room ,and told Hope that she had been drinking and was sick. Later a Mr. Perry Isom, a 74-year old man who looked after the renting of the rooms for the owner, went to the defendant's apartment and she saw defendant go in, and witness heard a noise like someone falling; and Hope's mother called her to come in the apartment. She looked out from her kitchen door down the hall and in about 15 minutes saw Mrs. Revard standing in the hall by the couch, and saw defendant come out into the hall and push his wife toward their room. Mr. Isom was on the couch motionless. Mary fell when her husband pushed her, and defendant commenced kicking his wife and telling her to get into the room, and she kept answering, 'All right, all right,' but could not get up, but did get to her knees and opened the door and defendant then kicked her in the back. She heard a commotion in defendant's apartment that continued for twenty or twenty-five minutes. Hope Pena admitted on cross-examination that at the preliminary hearing she did not testify about the kicking. Her statements on direct examination had not been objected to. She said on re-direct examination that the first time she had mentioned this kicking, so far as the County Attorney was concerned, was from the witness stand. When asked why she did not so testify on preliminary, she said: 'I don't know; it seemed awful to me the way he did it.'

"At about 6 P. M, Ronald Eden, grandson of the owner of the building came up, accompanied by Donald Ray Herring, a friend, and he had discovered Mr. Isom about half unconscious lying on the couch in the hall and bleeding, and he asked what had been going on, and then Ronald went to defendant's apartment and found Mary Revard nude and lying face down on the floor, and defendant was standing over her with his left foot on her body, and her body was covered with bruises and there appeared to be cuts on her face, and Ronald asked defendant what was going on and defendant said that it was none of Ron

ald's business, and got a chair and started toward the door, and the two boys went on down the hall and Donald Herring went to telephone Ronald Eden's grandfather but saw two policemen and told them what he had seen and the police went to the scene immediately and Mr. Isom was still on the couch and bleeding and could not talk. Defendant would not open the door to his apartment and the officers kicked it in and arrested and handcuffed the defendant and got an ambulance for Mary Revard and Mr. Isom. Mrs. Revard was dead on arrival at the hospital, and Isom did not regain consciousness until the next afternoon. He testified that defendant apparently took offense because he would not lend him $15 for expenses to Ponca City, but that he did lend defendant $2, and was handed fifty cents back. He said that near the divan defendant knocked him down and beat him up. He received eight broken ribs, a fractured skull, an injured neck and a damaged eye. He denied drinking with the Revards that particular day or putting his hand on Mrs. Revard.

The arresting officers testified that when they arrested defendant his breath smelled of alcohol, and that in their opinion he was drunk. They said defendant at time of arrest said: 'A man has got a right to give his wife a whipping when he catches her fooling around.'

R. A. Hudson, homicide officer, Oklahoma City police department, testified that defendant in conversation with him said that he was sober the afternoon of May 8, 1957; that he and his wife were in their room; that he had two jiggers of whisky; that Mr. Isom brought in some whiskey and that his wife and Isom drank and that Isom placed his hand on his wife's seat and that this made him mad and he put Isom out, and whipped his wife. Witness said that he told defendant that his wife was dead, and defendant said that did not make any difference that he was mad at the time.

"The tenants on the first floor just under defendant's apartment testified to hearing loud thumps on the floor overhead; this commenced about 4 P. M. May 8, 1957 and continued; they heard scuffling and groaning and voices, as if a male and female. The noise continued for about an hour and some thirteen witnesses testified for the State. Photographs of the room, and of Mrs. Revard's nude body, showing the many bruises, were received in evidence; also the white dress deceased was shown to have been wearing just prior to her death. An autopsy was performed by Dr. Alfred M. Shidler, who testified that his conclusion was that 'death was due to multiple traumatic injuries which involved particularly the head, chest, abdomen.' He said it was presumed that the injuries to the head alone were sufficient to have caused death.

"The defendant's testimony covered 119 pages of the record, covering in detail his activities from boyhood to the present tragedy, including his life with five women with whom he lived from the time he was 17 years to 41 years of age. Defendant testified that he was 5 years of age when his father died. As a youth he lived mostly with his sisters Helen and Viola, and a housekeeper. His mother moved to Pawhuska from Ponca City, and ran a beauty shop, and remarried, but his step father did not take an interest in him.

"His own father was part Osage, so defendant got a check every three months from a headright.

"His sister's husband, Mr. Rice, took interest in him and took him fishing and boating, etc. He was then in junior high school at Ponca City. Attended Oklahoma Military Academy. Said he got a girl pregnant and had to quit school. Back in Ponca City High School when he was 17 years of age he got in love with a girl 15 years old, but she married someone else, so he married another girl, but this lasted only for a few months. He got to drinking, got to seeing his first love, Geneveve, and she got a divorce as he did, and they married. He got $15,000 from an inheritance.

bought a new car, and they lived it up travelling and stopping at the best hotels. When he was broke he returned to Ponca City and commenced working in a drug store; had a son born; was still getting headright money; had another child born and moved to Tulsa; took a correspondence course; got a job in Tulsa involving material control and cost accounting; also took a course in safety engineering; worked for oil companies. He worked up to a job with one company with a salary of $500 to $550 per month; travelled the states of Oklahoma, Texas, New Mexico and part of Illinois going by auto and air lines; was member of Elks Club and Petroleum Club. He and his wife got to drinking and eventually their marriage went on the rocks. She divorced him. This was in late 1948 or early 1949. One night they came home about 2 a. m. and he said that he went to bed and went to sleep but was awakend by his wife hollering and that he found her lying part way in a closet and bleeding at the mouth. She told him that she started to the bath room and ran into a door, but he said that at the divorce hearing following this his wife changed her statement and said that defendant had hit her. He said that if he did that, he did not know it. Defendant kept drinking to excess and lost his job, drifted then, and borrowed money from his sisters. Was arrested for non-support of his children but the punishment was suspended. Went back to Tulsa and got to drinking with a legal secretary, Ann Loger, and they commenced living together. He got a job at Independence, Kansas and commuted back and forth and had agreed to go through a civil ceremony, but said that back in Tulsa he saw an acquaintence coming out of Ann's apartment and it made him mad. He admitted that Ann's aged mother lived with them; said on a following visit he and Ann got into an argument and that she raised a skillet to hit him and that the next thing he knew he was in jail, charged with assault with intent to kill. Ann weighed 122 pounds. She was taken to the hospital, and he stayed in jail

two and a half months; the assault charge had been dismissed but there was a drunk driving charge pending, but one day he was permitted to go into the hall at the jail to telephone and just walked off and went to Ponca City to get help from his eldest sister. He was still drinking and on advice of his physician was committed to the State Hospital at Fort Supply for a 90 day period, but after 62 days he was discharged by the physician. He had met a girl while in the hospital who was there for treatment for alcoholism. He went back to Woodward and picked her up and they commenced living together, and in January, 1954 were married. They lived in Oklahoma City. He got a good job again for an oil field specialty company, but got arrested in Paris, Texas, for drunken driving and spent 125 days in jail; came back to Oklahoma City and started on a cure program with the A. A., but started travelling again and met another alcoholic woman in Amarillo in a beer joint, and started living with her as husband and wife. He worked at service stations in Oklahoma City.

"His version of the crime of murdering Mary Revard was about as follows: He testified to long drunk sprees with his common law wife, Mary, and said that she had cirrosis of the liver and had to take blood transfusions; that he had various jobs over Oklahoma City as an attendant at service stations, salesman and assistant bookkeeper at a pawn shop, etc. On Saturday prior to May 8, 1957, he said that it was raining and he did not want his wife to get wet, so he took a cab to go to the grocery store for the week's groceries, but when he got home his wife wanted liquor so he went and got some, and that his wife got drunk and this continued until Wednesday, May 8, 1957; that on that day he got up sober between 12:30 and 1 o'clock with intention to go to Ponca City to get some money and that he had made up his mind to get there sober. He took one drink on Wednesday morning, his wife took about three or four swallows of canned tomatoes for breakfast; he did not eat until

later when he ate a sandwich and drank a glass of milk. His wife kept on drinking. Mr. Isom, the house caretaker, furnished about four pints of whiskey; that he first came in about 1 o'clock, that his wife put on a white house dress, the one in evidence. He said that about 5 P. M. he put Isom out of his apartment. Defendant said that he left Isom in the apartment once when he went to get cigarettes and once again around 4:30 P. M. when he went to West Grand Avenue to borrow five or ten dollars to help on his expenses to Ponca City, and Josephson let him have $5. He said he got back to his room at 5 o'clock; that he asked Isom to leave because he wanted his wife to sober up and he wanted to go to bed because he had to get up at 4:15 the next morning. He said Isom got belligerent so he knocked him down and put him out. In answer to a leading question he said that before that Isom had touched his wife. He claims that he hit Isom but once; that if he beat him up he did not know it. Following this he said that Mary had poured another drink and that he knocked it out of her hand and the glass broke and the whiskey and water spilled on the floor; that she got sick and went to get a pan and fell on the floor in front of the ice box and that he was in the process of picking her up when the Eden boy knocked and then opened the door; that he asked the boy to leave because his wife was nude. He denied beating his wife. He said the officers soon arrived and arrested him. He denied wanting to kill his wife.

"Testifying for defendant was Dr. Neal B. Kimerer, psychiatrist, who received his medical degree from the University of Chicago in 1944 and who received training at the Menninger Foundation at Topeka, Kansas. He spent an hour with the defendant in the Oklahoma County jail, and a week later spent another hour there with him, and over two months later saw defendant again and spent over an hour with him. He thought he had spent sufficient time with defendant to determine his mental condition. He said that Dr.

Robert S. Wilson, psychologist, aided with the psychological tests. It was his conclusion that defendant had an unconscious hatred for women, and said: 'Given a set of circumstances in which his particular needs may not be met, he reacts very violently and forcibly in a manner which is unpredicted.' He concluded that defendant was psychotic and that he could be dangerous. He thought that defendant did not have control over his impulses.

"Counsel for defendant framed a long hypothetical question summarizing defendant's difficulties and asked: 'What is your opinion as to whether he knew the difference between right and wrong at that time? A. I feel that he was unable to distinguish between right and wrong.' He further said that at the time in question it was his opinion that defendant did not know the probable consequences of his acts.

"R. S. Wilson, PhD, Psychologist, who saw defendant one time while he was in jail at the request of Dr. Kimerer reached the same conclusion as did Dr. Kimerer, already stated. He also said that he subscribed to the theory of an uncontrollable impulse: that even though defendant might know what he was doing, his actions would be beyond his control.

"Alex Josephson testified to the afternoon of May 8, 1957 and lending defendant $6. It was his opinion that defendant was not intoxicated at that time.

"Dr. C. E. Northcott, Ponca City, testified to having known the defendant since he was about three years old. Witness was the family physician. 'He said: 'During the course of time I have attended Joe I have treated him mostly for his emotional instability and especially his drinking. * * *' Witness went on to tell about in October, 1954 when defendant came to him after excessive drinking and he had placed him in the State Hospital at Fort Supply for treatment. He admitted that Joe was an alcoholic.

"Mrs. Albert Rice, sister of defendant, testified to her brother's instability, telling about one time when he was in high school and she tried to get him up for breakfast and he did not like what she had fixed, so he grabbed the table cloth, jerked all the dishes off on the floor and struck her. She told about later in October, 1954 when she thought that he was intoxicated and about getting him to a hospital.

"In rebuttal the State showed by Capt. John Butler of the Oklahoma City Police Department that he lived in the same apartment house with defendant and his then wife, Genevieve, at 208 E. Park, Oklahoma City, in 1937. Defendant worked in a drug store. The wife liked to play checkers and when not playing would sometimes watch other roomers play, and defendant would call her to their room and witness would hear a disturbance, and several times after such occasions he noticed the wife with black eyes.

"A number of lay witnesses who knew the defendant testified for the State and gave as their opinion that defendant was rational.

"Mrs. Ann Layer of Tulsa testified and denied that defendant had paid the rent on her apartment as he testified, but claimed that she drank with him, and that he just moved in and she was afraid of him; that he said he could not pay his hotel bill. She claimed that they did not occupy the same bed but admitted intimacy with defendant. She said that her 79 year old mother lived with her, and that defendant got mad at her mother because she did not want him in the apartment, and defendant hit the mother with the heel of a shoe and this put her mother to bed for three weeks; that the defendant also hit her 81 year old uncle and knocked him down. She said that in July, 1954 she was typing a brief for an attorney and defendant had been around the apartment all day, mostly in the kitchen and drinking and she asked him to move, and the first thing she knew defendant

hit her on the chin and knocked her backwards across the room and broke the chair and dragged her around the apartment by one of her arms, broke her nose in two places, broke a number of her ribs, ruptured her lung and stabbed her in the stomach with a knife that the police came and arrested defendant and took her to the hospital where she was confined for six weeks, and weighed but 98 pounds. Her normal weight was 122 pounds. It was her opinion from her acquaintence with defendant that he was rational.

"Dr. Moorman Prosser said that he graduated from Medical School of the University of Oklahoma in 1935, detailed his training and experience with the criminally insane. He said that he had practiced psychiatry for 20 years in the State of Oklahoma.

"He said that at the request of the County Attorney on November 15, 1957 he went to the jail to examine defendant, and talked with him for 10 or 15 minutes, but defendant would not permit an examination unless his attorney was present. Witness said during his talk with defendant: 'Well, during that period I observed that he was well oriented, somewhat on the defensive and well able to manage his own affairs.'

"Witness was then asked a hypothetical question based on the history of defendant's case, and then testified as follows:

"Q. (By MR. THEUS [Attorney for State]: Doctor, based on these assumptions, do you have an opinion as to whether or not that man knew right from wrong, knew the consequences of his act when he so beat and killed a woman on May 8th, do you have an opinion?

A. Yes, sir.

Q. What is that opinion?

A. It is my opinion that he did and I have reasons to substantiate it.

Q. What are those reasons?

A. An individual, such as has been described by the hypothetical question with a warping personality that carries the psychiatric diagnosis of a character disorder with passive and aggressive features or another name of older terminology but which, however, is better known, is psychopathic personality.

"Now a psychiatric personality of aggressive character is a form of warped personality usually characterized and manifested by hostility and angers which makes it difficult for the individual to get along over long periods of time with those with whom he is associated and, therefore, they do change jobs and change wives often. Such individuals are assaultive and nervous but are careful never to approach those who might defend themselves effectively. One might say with justice that this type of attitude is one in which hostility is brought out and displayed only when their desires are not brought to the front on the part of other persons. Such persons, also, characteristically explain to themselves their own acts on the basis of the fact that it was not their fault, it was somebody else's fault that made them do whatever they did. * * *

Q. All right, Doctor, let me ask you a few questions in connection with that. Is this diagnosis of such person a type of insanity?

A. No, no. Such individuals may have pressure and may, when pushed or cornered, develop insanities more easily, perhaps, than the average person.

Q. Are there many criminals who have this diagnosis?

A. Yes, there are great groups of such persons but a substantial percentage of all incarcerated criminals have this diagnosis.

Q. Is this psychological disorder one that is treatable and curable?

A. It is not. Anything, of course is treatable, but it is not curable.

Q. What is it that is psychopathic about these personalities?

A. The term implies perverted or warped attitudes which these individuals have. * * *

Q. In your opinion is it true that such a person cannot remember these acts?

A. They do not remember the acts consciously; they repress it, an act which is detrimental to their own status and position can be more effectually forgotten by them than by an average person. All of us repress and forget things we do not wish to remember but they can do it more completely and effectively than the average person."

Witness further testified on cross-examination:

Q. "'Would you say now then not all convicted persons who are insane remember the acts they did?

A. It is characteristic, sir, that people who are truly insane and who commit a criminal act because they are insane or because of the nature of their act have no need to forget it. *It is only those who know the difference between right and wrong who find it necessary to forget the act.*

"Filed In Criminal Court of Appeals
of Oklahoma, December 3, 1958

Andy, Payne, Clerk."

"IN THE CRIMINAL COURT OF APPEALS
OF THE STATE OF OKLAHOMA

No. A-12642

JOSEPH ARNOLD REVARD,

Plaintiff in Error,

VERSUS

THE STATE OF OKLAHOMA,

Defendant in Error.

"PETITION FOR RE-HEARING

"Comes now the above named plaintiff in error and respectfully requests that he be granted a rehearing herein and for grounds therefor respectfully shows to the court that certain questions of law decisive of the case and duly submitted by counsel have been overlooked by the court.

Respectfully submitted,
Granville Scanland,
Attorney for Plaintiff in Error.

"Filed in Criminal Court of Appeals of Oklahoma
Dec. 10, 1958

ANDY PAYNE, CLERK

"IN THE CRIMINAL COURT OF APPEALS
OF THE STATE OF OKLAHOMA

"Present: John A. Brett, Presiding Judge.

"Present: John C. Powell, Judge.

"Present: Kirksey Nix, Judge.

"ISSUED THE FOLLOWING ORDERS:

A-12642—Joseph Arnold Revard v. State.

Petition for Rehearing Denied."

John A. Brett, Presiding Judge.

"ATTEST: Andy Payne, Clerk."

APPENDIX B

"Title 21 O. S. A.:

"*Sec. 692.* HOMICIDE CLASSIFIED

"Homicide is either:

"1. Murder

"2. Manslaughter;

"3. Excusable homicide; or,

"4. Justifiable homicide. R. L. 1910, Sec. 2309.

"*Sec. 701* MURDER DEFINED

"Homicide is murder in the following cases:

"1. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony, R. L. 1910, Sec. 2313.

"*Sec. 702* DESIGN TO EFFECT DEATH INFERRED

"A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed. R. L. 1910, Sec. 2314.

"Sec. 704 ANGER OR INTOXICATION NO DEFENSE

Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time. R. L. 1910, Sec. 2316.

"*Sec. 711.* MANSLAUGHTER IN THE FIRST DEGREE DEFINED

"Homicide is manslaughter in the first degree in the following cases:

"1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.

"2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constituted excusable or justifiable homicide.

"3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed. R. L. 1910, Sec. 2320.

"*Sec. 715.* PUNISHMENT FOR MANSLAUGHTER IN THE FIRST DEGREE

"Every person guilty of manslaughter in the first degree is punishable by imprisonment in the penitentiary for not less than four years. R. L. 1910, Sec. 2324.

"*Sec. 731.* EXCUSABLE HOMICIDE, WHAT IS

"Homicide is excusable in the following cases:

"1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent.

"2. When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat provided that no undue advantage is taken, nor any dangerous weapon used, and that the killing is not done in a cruel or unusual manner. R. L. 1910, Sec. 2332.

"*Sec. 733.* JUSTIFIABLE HOMICIDE BY ANY PERSON

"Homicide is also justifiable when committed by any person in either of the following cases:

"1. When resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person is; or.

"2. When committed in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; or,

"3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace. R. L. 1910, Sec. 2334.

"Title 21 O. S. A.

"*Sec. 152.* PERSONS CAPABLE OF COMMITTING CRIMES —EXCEPTION — CHILDREN — IDIOTS — LUNATICS — IGNORANCE — COMMISSION WITHOUT CONSCIOUSNESS — INVOLUNTARY SUBJECTION

"4. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.

"Title 22 O. S. A.

"*Sec. 1161.* ACTS OF INSANE PERSON NOT PUNISHABLE —OFFENSE NOT TRIABLE OR PUNISHABLE WHILE DEFENDANT INSANE — ACQUITTAL ON GROUND OF INSANITY — COMMITTMENT TO HOSPITAL FOR INSANE

"An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense, while he or she, as the case may be, is insane; but where in any criminal action by indictment or information the defense of insanity is interposed either singly or in conjunction with some other defense the jury must state in the verdict, if it is one of acquittal, whether or not the defendant is acquitted on the ground of insanity and where the defendant is acquitted on the ground that he or she, as the case may be, was insane at the time of the commission of the crime charged, such person shall if the jury returning such verdict state therein that they deem the discharge of said person dangerous to the public peace or safety be by the trial court committed to one of the State's hospitals for insane, there to be held and kept as a patient until legally discharged therefrom.

"*Sec. 1162.* JURY TO TRY SANITY

"When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant, the court must order a jury to be impaneled from the jurors summoned and returned for the term, or who may be summoned by direction of the court, to inquire into the fact. R. L. 1910, Sec. 6050."